No. 91-7169

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JAMES ARMIN FOWNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a liquid mixture containing a detectable amount of the controlled substances methamphetamine and P2P is, for sentencing purposes, a "mixture or substance containing a detectable amount of" controlled substances.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is unreported, but the judgment is noted at 947 F.2d 954 (Table).

JURISDICTION

The judgment of the court of appeals was entered on October 30, 1991. The petition for a writ of certiorari was filed on January 28, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a guilty plea in the United States District Court for the District of New Mexico, petitioner was convicted of manufacturing more than 100 grams of a mixture containing a detectable amount

of methamphetamine (21 U.S.C. 841(a)(1)) and using a firearm during and in relation to a drug trafficking crime (18 U.S.C. 924(c)). Petitioner was sentenced to a mandatory five-year term of imprisonment on the firearms offense. After a downward departure from the applicable Guidelines sentencing range, petitioner was also sentenced to 30 months' imprisonment on the methamphetamine count, to be served consecutively to the sentence on the firearms count. The district court also imposed a total of five years' supervised release. The court of appeals affirmed. Pet. App. A1-A14.

1. On October 15, 1989, drug enforcement authorities discovered a methamphetamine laboratory on petitioner's property. The agents seized 79.7 grams of methamphetamine, a quantity of marijuana, and two semi-automatic pistols. In addition, the agents seized 24 gallons of a liquid mixture containing a detectable amount of methamphetamine and the chemical P2P, a controlled substance that is used in the manufacture of methamphetamine. Pet. App. A3.

2. Petitioner urged the district court not to consider the weight of the 24-gallon liquid mixture in determining his sentence. If the weight of that mixture were counted, petitioner's Guidelines sentencing range would be 168-210 months' imprisonment. According to petitioner, if the weight of the mixture were not included, his Guidelines range would be 24-30 months' imprisonment. Pet. App. A3.[1] Since petitioner had pleaded guilty to manufacturing more

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[1] Contrary to petitioner's calculation, even excluding the mixture and ignoring the fact that petitioner pleaded guilty to manufacturing more than 100 grams of a mixture containing metham-

than 100 grams of methamphetamine, however, it was undisputed that he was subject to a mandatory minimum sentence of ten years' imprisonment under 21 U.S.C. 841(b)(1)(A)(viii). See Pet. 1.

The district court held an evidentiary hearing, at which petitioner called Dr. Cary Morrow, a chemist, to testify as an expert witness. Dr. Morrow testified that detectable amounts of methamphetamine and P2P were present in the liquid mixture recovered from petitioner's laboratory. He stated that in his opinion the liquid mixture was "waste" left over from the process of manufacturing methamphetamine. He added, however, that additional methamphetamine and P2P could have been recovered from the mixture by allowing the mixture to settle or by reprocessing it with additional chemicals. Pet. App. A4; Gov't C.A. Br. 5-6.

The district court did not think that it was necessary to determine whether the 24 gallons of liquid mixture was waste. Instead, the court held that the Sentencing Guidelines and case law required it to consider the total weight of any mixture containing a detectable amount of a controlled substance. Pet. App. B52-B54.

Because petitioner had provided substantial assistance in the investigation and prosecution of other cases, the government moved the district court for a downward departure at sentencing. See 18

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phetamine, petitioner's Guidelines sentencing range would have been 37-46 months. Based only on the 79.7 grams of methamphetamine seized from the laboratory (and assuming that that material was a mixture rather than pure methamphetamine) petitioner's base offense level would be 22. See Guidelines § 2D1.1(c)(11) (Nov. 1, 1989). Reducing that base offense level by two levels for petitioner's acceptance of responsibility would result in an adjusted offense level of 20, which, coupled with petitioner's criminal history category of II, yields a 37-46 (not 24-30) month range.

U.S.C. 3553(e); Sentencing Guidelines § 5K1.1. The court departed downward from the applicable ten-year statutory minimum sentence and from what the court had determined, over petitioner's objection, to be the Guidelines range of 168-210 months' imprisonment. The district court accordingly sentenced petitioner to 30 months' imprisonment on the drug count (consecutive to the five-year mandatory sentence on the firearms count). Pet. App. A4-A5.

3. Petitioner appealed his 30-month sentence on the drug count, claiming that the district court had improperly calculated his Guidelines range by considering the weight of a mixture consisting of "waste" material. Although the 30-month sentence was within the 24-30 month Guidelines range that petitioner had sought, petitioner asserted on appeal that the district court should have measured the downward departure using the 24-30 month, rather than 168-210 month, Guidelines range as the initial baseline. Pet. App. A5.

The court of appeals affirmed. The court agreed with the district court that the weight of the entire mixture should be considered. Pet. App. A5-A9. Because the mixture contained a detectable amount of a controlled substance, the court of appeals held that its entire weight was to be considered without regard to whether the mixture was "waste." Id. at A6-A7 (citing Sentencing Guidelines § 2D1.1 and case law thereunder). The court explained that "the concept of waste is not easily defined" and that petitioner's expert witness had testified that the P2P remaining in the mixture could be recovered by allowing the mixture to settle or

by reprocessing it with additional chemicals. Id. at A7-A8. The court concluded that, "[g]iven the potential saleability of the entire liquid mixture or at least part of it, we cannot say that the inclusion of the weight of the entire mixture was contrary to the 'market-oriented' approach intended by Congress" in sentencing drug offenders. Id. at A9. The court also rejected petitioner's claim that inclusion of the total amount of the mixture violated due process and equal protection principles. Ibid.

ARGUMENT

Petitioner renews his contention that it was improper to include the total amount of the 24-gallon mixture containing detectable amounts of controlled substances in calculating his Guidelines sentencing range.

The courts below correctly held that the weight of the 24-gallon mixture, which petitioner concedes contained detectable amounts of methamphetamine and P2P, must be factored into the drug quantities used to determine petitioner's Guidelines sentence. The Sentencing Guidelines provide that "[u]nless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance." Guidelines § 2D1.1(c) n.* (Nov. 1, 1991). See also id. n.1 ("'Mixture or substance' as used in this guideline has the same meaning as in 21 U.S.C. § 841"). With respect to methamphetamine, the Guidelines, as well as the statute, specifically provide that sentencing may be based either on the weight of the pure drug or on the weight of the

mixture or substance that contains a detectable amount of the drug. See 21 U.S.C. 841(b)(1)(A)(viii) (establishing ten-year minimum sentence for traffickers of "100 grams or more of methamphetamine * * * or 1 kilogram or more of a mixture or substance containing a detectable amount of methamphetamine"); Sentencing Guidelines § 2D1.1(c) (similarly basing penalties either on the weight of "Methamphetamine (actual)" or on the weight of a mixture containing a detectable amount of methamphetamine).

There is no exception, either in the statute or the Guidelines, that permits exclusion of mixtures containing detectable amounts of controlled substances on the ground that they are not "readily marketable" or are "waste." Petitioner's claim for such an exception parallels the claims made in Beltran-Felix v. United States, cert. denied, 112 S. Ct. 955 (1992), and Mahecha-Onofre v. United States, cert. denied, 112 S. Ct. 648 (1991). As we explained in our briefs responding to the petitions for writs of certiorari in those cases, the statute and Sentencing Guidelines, on their face and as interpreted by this Court in Chapman v. United States, 111 S. Ct. 1919 (1991), require inclusion of the gross weight of any mixture that contains a detectable amount of a controlled substance, and are not limited to mixtures that are readily ingestible or marketable.

We did not oppose certiorari in Mahecha-Onofre because the courts of appeals have taken divergent approaches to whether the term "mixture or substance" in the statute and Guidelines is limited to materials that are ingestible or consumable. In

contrast to the First Circuit's approach in Mahecha-Onofre, the Sixth and Eleventh Circuits have concluded that only the weight of consumable mixtures may be considered in sentencing drug offenders under the statute and Guidelines.[2] United States v. Jennings, 945 F.2d 129, 136 (6th Cir. 1991) (not counting weight of mixture of "a small amount of methamphetamine and poisonous by-products not intended for ingestion") (emphasis in original); United States v. Rolande-Gabriel, 938 F.2d 1231, 1235-1238 (11th Cir. 1991) (not counting weight of cocaine and liquid waste in which it was mixed because statute only applies to "usable drug mixtures").

Notwithstanding our acquiescence in the petition in Mahecha-Onofre, this Court denied the petition for certiorari. 112 S. Ct. 648. The Court subsequently also denied certiorari in Beltran-Felix. 112 S. Ct. 955. In light of the denials of certiorari in Mahecha-Onofre and Beltran-Felix, there is no reason to grant certiorari in the present case.

Moreover, even if petitioner were correct that "unusable waste" materials -- i.e., drug by-products that are not ingestible or marketable -- are not to be counted for sentencing purposes (see Pet. 17), that legal position would not help him in this case. Relying on the testimony of petitioner's expert witness, the court

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[2] Like the First Circuit in Mahecha-Onofre and the Tenth Circuit in this case, the Fifth and Ninth Circuits have held that the total weight of a mixture is to be counted, regardless of whether it is ingestible or consumable. United States v. Mueller, 902 F.2d 336 (5th Cir. 1990); United States v. Butler, 895 F.2d 1016 (5th Cir. 1989), cert. denied, 111 S. Ct. 82 (1990); United States v. Baker, 883 F.2d 13 (5th Cir.), cert. denied, 493 U.S. 983 (1989); United States v. Beltran-Felix, 934 F.2d 1075 (9th Cir. 1991), cert. denied, 112 S. Ct. 955 (1992).

of appeals specifically noted that the controlled substances in the mixture were retrievable and that the mixture was saleable. Pet. App. A7-A8. For that reason, even under the theory that unusable "waste" should not be counted, the liquid at issue in this case would not be excluded from the sentencing calculation. Thus, even if this Court were inclined to resolve the conflict in the circuits that we identified in Mahecha-Onofre, this case would not be an appropriate vehicle for doing so.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3] Petitioner argues (Pet. 16-17) that including "waste" liquid for sentencing purposes results in an irrational -- and thus unconstitutional -- sentencing scheme. While extreme cases can be imagined, however, this is not one of them. The 24 gallons of liquid containing controlled substances was produced in the course of the manufacturing process, a process that resulted in the production of a substantial amount of methamphetamine. It is not irrational to punish manufacturers of illegal drugs based on the amounts of controlled substances (and mixtures containing those substances) that are produced in the ordinary course of drug manufacturing, just as it is not irrational to punish distributors of illegal drugs based on the weight of the mixtures containing the drugs that they distribute. See Chapman v. United States, supra.